(24)

No. 1021 78, 79

In the Supreme Court of the United States

CLARENCE CALDWELL ..... Petitioner

vs.

THE TRAVELERS INSURANCE COMPANY ..... Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

THOMAS B. PRYOR,
THOMAS B. PRYOR, Jr.,
Counsel for Petitioner.

G. BYRON DOBBS,
HUGH M. BLAND,
of Counsel.

INDEX

Petition for Writ of Certiorari

Brief in Support of Petition

Table of Authorities Cited

CASES

STATUTES CITED

In the Supreme Court of the United States

CLARENCE CALDWELL ..... Petitioner

vs.

THE TRAVELERS INSURANCE COMPANY ..... Respondent

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

MAY IT PLEASE THE COURT:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

The inception of this litigation was the serious personal injury sustained by the petitioner, Clarence Caldwell, on the 3rd day of October, 1938, by a motor vehicle in the city of Fort Smith, Arkansas.

According to the allegations of the complaint, which he filed in the State Court against the Black and White Transfer Company, a Corporation, and others (R. 5) "he was rendered unconscious and remained unconscious for a period of nine (9) days; that his face and throat were cut from ear to ear; that his right jaw bone was broken, making it necessary to remove two (2) inches of said bone; that his right arm was cut from his wrist to above

the elbow, which required forty-seven (47) stitches to close; his right leg was broken in nine (9) places between the ankle and the knee, and the flesh and ligaments torn and the bone extended therefrom; that his left leg was broken in eleven (11) places between the ankle and the knee, and the skin, flesh and muscles of his body were torn, lacerated and bruised, and his body otherwise bruised and injured; that he suffered and still suffers great and excruciating pain, and was confined to his bed for a period of approximately twelve (12) months, at St. Edwards Hosiptal in Fort Smith, Arkansas.

" * * * he has become greatly disfigured by reason of the loss of the majority of his right jaw bone; that the injuries to his right leg has caused his right foot to become numb and said plaintiff is required to wear a brace; that his left leg is weak and permanently injured; that his ability and capacity to earn a livelihood and support his family has been thereby permanently and seriously impaired."

The complaint filed by the petitioner in the State Court alleged that the defendant Black and White Transfer Company, a Corporation, and the other defendants were jointly operating the vehicle which caused his injuries, and a verdict and judgment were rendered on October 30, 1941, against the Black and White Transfer Company, a Corporation, and other defendants, in favor of the petitioner herein, in the sum of Fifteen Thousand Dollars ($15,000.00). (R. 11)

An execution was issued on the aforesaid judgment on the 4th day of December, 1941, and a return of the

Sheriff thereon that he made diligent search and failed to find any unencumbered property in the then named defendants upon which to levy. (R. 11) Thereafter, and on the 11th day of December, 1941, a suit for a declaratory judgment was filed in the United States District Court for the Western District of Arkansas, Fort Smith Division, in which it was alleged that the respondent herein, The Travelers Insurance Company, had a liability policy in force, at the time of petitioner's injury, insuring the operation of the Black and White Transfer Company, Inc., pursuant to the statutes of the state of Arkansas and the order of the Arkansas Corporation Commission requiring such insurance coverage. (R. 2)

The respondent, hereinafter referred to as the insuranace company, filed an answer to the complaint (R. 12) and alleged that the judgment against the Black & White Transfer Company, Inc., and others was not a final determination of the liability of the Black & White Transfer Company, Inc., for the reason that the said Black & White Transfer Company, Inc., had prayed and been granted an appeal from the judgment rendered against it in favor of the plaintiff; that it, The Travelers Insurance Company, was not a party to said suit and was not notified by the Black and White Transfer Company, Inc., of said suit as required by the policies herein sued upon and that it did not know that said suit was pending until the plaintiff's attorney made demand upon it on account of said judgment; that plaintiff was not entitled to recover a judgment against the Black and White Transfer Company, Inc., and that the evidence introduced by the plaintiff in said suit was insufficient to support the verdict and judgment rendered therein; that should the Supreme Court of Arkansas

affirm the judgment rendered in favor of the plaintiff against the Black and White Transfer Company, Inc., then will arise a controversy between the plaintiff and this defendant on the issue of the coverage of the liability incurred by the Black and White Transfer Company, Inc., but that until the Supreme Court of Arkansas determines the appeal there is no liability established against the Black and White Transfer Company which could be a basis for the suit against the defendant.

The defendant prayed that the action be dismissed because no controversy exists between plaintiff and it.

The defendant further alleged that assuming the taxi-cab which struck the plaintiff was owned by the Black and White Transfer Company, Inc., and driven by one of its employees, that the insurance referred to does not cover the taxicab because the Black and White Transfer Company, Inc., was operating under a certificate granted by the Arkansas Railroad Commission to operate a motor freight transportation line in Arkansas as an irregular common carrier in intrastate freight of specified commodities consisting of used household goods, used machinery and tools and store fixtures over certain designated routes within the State.

That the defendant issued to the said Black and White Transfer Company, Inc., its policy No. FA-1109020 pursuant to paragraph (e) of Section 6 of Act 99 of the Acts of 1927 and described the vehicles to be used in said business, which vehicles were trucks, a trailer and a tractor as a condition precedent to issuing of the certificate commonly called a permit, and made thereupon the statutory endorsement required by law; that said

endorsement waived a description of the vehicles to be used in the business and is limited to injury caused by any and all motor vehicles operated by assured pursuant to certificate issued by the Railroad Commission; that the taxicab by which the plaintiff was injured was not operated in the business which the certificate authorized the company to operate; that the operation of any other line than authorized by said certificate made such company (Black & White Transfer Company, Inc.,) or any individual so doing, guilty of misdemeanor and punishable by said paragraph (e) of Section 6 of Act 99 of the Acts of 1927.

That policy No. FA-1109209 was not a statutory policy, but a contractual policy supplementary to the statutory policy, and was not required to contain the statutory endorsement; that said policy limited its coverage to operations authorized in the certificate and limited it to vehicles specified herein, consisting of vans, tractor and a one-ton semi-trailer; that said policy is not applicable to any injury received by the plaintiff by riding in another vehicle of the Black & White Transfer Company, Inc., other than those mentioned and described in Rider No. 1587.

That each of the policies referred to in the complaint contained a provision under the caption "exclusions" as follows:

> "This policy does not apply (a) under any of the above coverages, while the automobile is used in the business of demonstrating or testing, or as a public or livery conveyance, or for carrying persons for a consideration, or while rented under contract or

lease, unless such use is specifically declared and described in this policy and premium charged therefor."

That the taxicab driven by Monty Robinson at the time of the injury to the plaintiff was used by its owner as a public conveyance and for carrying passengers for a consideration and was excluded from said coverage; that no premium was paid to the defendant covering any such liability as herein sued for.

That the proceedings in the Sebastian Circuit Court, Fort Smith District, are not relevant to the issues herein in that the issues therein raised and determined were the ownership of the taxicab and the operation thereof by Monty Robinson, whether negligent or not, and the conduct of the plaintiff; that this defendant was not a party thereto and had no knowledge of said suit while it was pending, but was entitled to notice of the pendency of said suit; that there was no issue raised or determined therein as to the coverage for the injuries therein sued upon and no issue could have been properly raised therein; that said issue is raised for the first time in this complaint wherein the plaintiff alleges that the policies did cover liability for his injuries and that is an issue now presented for the first time.

That it denies liability to the plaintiff for any amount and in the alternative alleges that if there is any liability it is limited under policy No. FA-1109020 to $5,000.00; that policy No. FA-1109209 is not applicable to the injuries sued upon.

By an amendment filed January 28, 1942, to the an-

swer, it is alleged that the Black & White Transfer Company, Inc., was not the sole owner of the taxicab driven by Monty Robinson which caused the injury to the plaintiff and that both policies contain a provision that the insured is the sole owner of the automobile and that the term "automobile" used in the policy is defined to be "the motor vehicle, trailer or semi-trailer described in the policy."

That the statutory endorsement attached to Policy No. FA-1109020 did not alter, change or modify the declaration that the vehicle covered by the insurance and causing the injury was solely owned by the assured.

The undisputed evidence in the record discloses that the insurance company on April 5, 1938, by letter, forwarded to the Public Service Commission of the state of Arkansas, an insurance binder (R. 20) furnishing insurance coverage in the amount of $25,000 for one person, "in accordance with the requirements of your department." The binder was filed on April 7 (R. 22) and provided that it should terminate "by issuing to the employer or assured named as such in the binder schedule a duly executed policy or policies."

Under date of April 28, 1938, the Arkansas Corporation Commission received a letter (R. 23) purporting to enclose policies No. FA-1109020 and FA-1109209, supplanting the binder which had theretofor been filed as per the requirements of the Arkansas Corporation Commission. The policies referred to in the letter are found as Exhibits 3 and 4 (R. 23-34). In each of these policies the Black and White Transfer Company Inc., was desig-

nated as the insured. The occupation of the insured was stated as "Furniture Mover." The description of the automobiles covered in policy No. FA-1109209 are two, two-ton vans; one, one and a half ton tractor and one, one-ton semi-trailer, all for commercial uses. In Policy No. FA-1109020, the same automobiles are described, together with the addition of a rider, No. 2707, providing for other automobiles not owned by the insured, but which might be hired by insured in the prosecution of its work.

Attached to policy No. FA-1109020 is the endorsement required by subsection (e) of section 2025 of Pope's Digest of the Statutes of Arkansas, reading as follows:

> "The policy to which this endorsement is attached is written in pursuance of and is to be construed in accordance with an Act of the General Assembly of the State of Arkansas for the year 1927, entitled, 'An Act to provide for the regulation, supervision and control of motor vehicles used in the transportation of persons or property for compensation in the State of Arkansas, and for other purposes,' and amendments thereto; and with the rules and regulations of the Corporation Commission of the State of Arkansas. Policies to be filed with the said Commission in accordance with said statute.
>
> "In consideration of the premium stated in the policy to which this endorsement is attached, the company hereby waives a description of the motor vehicles to be insured hereinunder, and agrees to pay any final judgment for personal injury, including death, resulting therefrom and or damage to property, other than assured, caused by any and all motor vehicles operated by the assured, pursuant to a certificate issued by the Corporation Commission of the State of Arkansas within the limit set forth in the schedule shown hereon, and further agrees that upon its failure to pay any such final judgment such judg-

ment creditor may maintain an action in any court of competent jurisdiction to compel such payment. Nothing contained in the policy or any endorsement thereon, nor the violation of any of the provisions thereof, by the assured shall relieve the company from liability hereunder or from the payment of any such judgment."

The schedule immediately following this endorsement provides:

"On each motor vehicle used for the transportation of property, not to exceed: $5,000.00 for any recovery for personal injury by any person, $10,000.00 for all persons receiving personal injury by reason of one act of negligence, and not to exceed $1,000.00 for damage to property of any person other than the assured.

"On each motor vehicle used for the transportation of persons, having passenger capacity of twelve passengers or less, not to exceed: $5,000.000 for any recovery for personal injury by one person; $10,000.00 for all persons receiving personal injury by reason of one act of negligence; and not to exceed $1,000.00 for damage to property of any person other than the assured."

Attached to and as part of policy No. FA-1109209 was Rider No. 2643, reading as follows:

"Excess Insurance Endorsement—Amending Policy No. FA-1109209.

It is agreed that such insurance as is afforded by the policy for bodily injury liability applies subject to the following provisions.

1. If bodily injury occurs with respect to which insurance is afforded under policy No. FA-1109020 (herein referred to as 'Statutory Policy') the insurance thereunder shall first be applied and the limits of liability thereunder shall first be fully exhausted before any of the limits of liability under this policy shall apply.

2. The limits of liability expressed in said statutory policy are included in the limits of liability applicable to this policy and are not in addition thereto."

The assured, Black & White Transfer Company, Inc., had obtained on October 5, 1937, a permit to operate a motor freight transportation line in Arkansas, as a common carrier, and was granted a certificate authorizing it as an irregular common carrier of intrastate freight of special commodities, consisting of used household goods, used machinery and tools, and store fixtures, over designated routes, four of which ran through the City of Fort Smith (R. 52).

Although the judgment entered in the State Court necessarily decided as an issue the fact that the assured, Black and White Transfer Company, Inc., was operating the vehicle at the time of this petitioner's injuries; and although the insurance policy, as required by the laws of the state of Arkansas, waived description of the assured's vehicles, and further provided: "Nothing contained in the policy or any endorsement thereon, nor the violation of any of the provisions thereof, by the insured, shall relieve the company from liability hereunder or from the payment of any such judgment", (R. 32) - - - the insurance company in the declaratory judgment suit attempted to reopen the question of agency of the driver of the vehicle and attempted to raise policy defenses that were clearly waived by the terms of the statutory endorsement.

The testimony in the case was that the dispatcher for the Black & White Transfer Company, Inc., received

a call for a pick-up truck to transfer some tools, or things (R. 35) and since a truck was not available, a cab of the Drivers Owners Ass'n., which was owned and operated by the same officers, was dispatched to take care of the job. The cab driver in addition to hauling the tools and the owner of the tools, had delivered a regular cab passenger, apparently for the cab company, prior to the accident (R. 37).

The oral testimony of witnesses raised some issues of fact in this connection but the trial court decided those issues in favor of the petitioner and on the 10th day of June, 1942, entered judgment in favor of the petitioner against the insurance company (R. 83) holding that the insurance company "is liable to the plaintiff for the amount of the judgment, interest, and costs obtained in and entered in the Sebastian Circuit Court, Fort Smith District, in the case of Clarence Caldwell v. Black & White Transfer Company, et al., up to but not exceeding the sum of $25,000.00 under and by virtue of the policies of insurance issued by the Travelers Insurance Company."

The court filed a written opinion (R. 60) setting out his findings of fact and conclusions of law. From this judgment an appeal was taken by the insurance company to the Circuit Court of Appeals, Eighth Circuit; and on February 15, 1943, that court delivered an opinion (R. 89) reversing the District Court, primarily on the ground that the vehicle which brought about the serious injuries to the petitioner, was not being operated at the time of the accident within the limits of its certificate of convenience issued by the Arkansas Corporation Com-

mission. Petition for rehearing was filed March 2, 1943, (R. 105) and was denied March 15, 1943 (R. 109).

B.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1.

The Circuit Court of Appeals erred in construing the policies of insurance involved herein contrary to the express provisions of the Arkansas State Statute requiring such insurance.

2.

The Circuit Court of Appeals erred in failing to construe the policies of insurance involved herein liberally in favor of the beneficiary, and strictly against the insurance company, contrary to the decisions of the Supreme Court of the State of Arkansas, the rule in Arkansas being well settled that insurance policies are to be construed strictly against the insurance company.

3.

The Circuit Court of Appeals erroneously assumed contrary to the findings of fact of the District Court and the evidence introduced in the case, that the vehicle which struck and severely injured the petitioner was being operated as a taxicab and not in the transportation of intrastate freight; and from this erroneous premise found that the vehicle was not being operated at the

time of the accident pursuant to the certificate of convenience and necessity.

4.

The Circuit Court of Appeals erroneously found, contrary to the evidence and findings of fact by the District Court, that the Black and White Transfer Company, Inc., was not operating pursuant to its certificate of convenience and necessity at the time of the accident.

5.

The Circuit Court of Appeals erred in holding that only $5,000.00 insurance was required by the Arkansas Corporation Commission, whereas the record discloses that $25,000.00 were the "requirements of the department."

6.

The court erred in holding that policy defenses which the insurance company would have as against the Black and White Transfer Company, Inc., were available as against petitioner, contrary to the language and spirit of the laws of the state of Arkansas, as well as the decisions of the Appellate Court of that state, and contrary to the decisions of other Federal courts.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding that Court to certify and to send to this

Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 12,399, The Travelers Insurance Company, appellant, v. Clarence Caldwell, appellee, and that said decree of the United States Circuit Court of Appeals for the Eighth Circuit may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

And your petitioner will ever pray.

SIGNED T. B. PRYOR, JR.

SIGNED THOS. B. PRYOR

Counsel for Petitioner.

G. BYRON DOBBS,
HUGH M. BLAND,
of Counsel.

BRIEF IN SUPPORT OF PETITION

I.

Opinion Below

Opinion by Honorable John E. Miller, Judge of the U. S. District Court, for the Western District of Arkansas, 45 Fed. Supp. 573, Clarence Caldwell v. Travelers Insurance Company, et al.

Opinion of Circuit Court of Appeals, Eighth Circuit, 133 Fed. 2d 649, Travelers Insurance Company v. Caldwell, reversing the District Court.

II.

Jurisdiction

1. The date of the judgment to be reviewed is February 15, 1943. Within the time provided by the rules of the Court of Appeals, for the Eighth Circuit, petitioner filed in that Court its petition for rehearing, same being filed on March 2, 1943, (R. 108). The petition for rehearing was considered and denied on March 15, 1943 (R. 109).

2. The jurisdiction of this Court is invoked under U.S.C.A. Title 28, Section 347 (a), formerly Section 247 of the Judicial Code as amended by the Act of February 3, 1925.

3. The following cases sustain the jurisdiction of this Court:

Erie R. R. Co., Petitioner v. Harry J. Tompkins, 304 U. S. 64.

John G. Ruhlin, et al, Petitioners v. New York Life Insurance Co., 304 U. S. 202.

Industrial Mut. Indemnity Co. v. Hawkins, 127 S. W. 457, 94 Ark. 417.

Hope Spoke Co. v. Maryland Casualty Co., 143 S. W. 85, 102 Ark. 1.

Equitable Surety Co. v. Bank of Hazen, 181 S. W. 279, 121 Ark. 422.

Life and Casualty Co. v. Ford, 292 S. W. 389, 172 Ark. 1098.

Metropolitan Casualty Insurance Co. of New York v. Munford, 126 S. W. 2d 282, 197 Ark. 1041.

American Fidelity & Casualty Co. vs. McKee, 130 S. W. 2d 12, 198 Ark. 601.

New York Life Ins. Co. v. Ashby, 138 S. W. 2d 65, 199 Ark. 881.

III.

Statement of the Case

It is believed that a full statement of the case has been given in the petition under the heading, "Summary Statement of the Matter Involved." In the interest of brevity, therefore, the statement will not be repeated here.

IV.

Specification of Errors

The errors are specified in the petition under the heading, "Reasons Relied on for the Allowance of the Writ".

ARGUMENT

THE CIRCUIT COURT OF APPEALS ERRED IN CONSTRUING THE POLICIES OF INSURANCE INVOLVED HEREIN CONTRARY TO THE EXPRESS PROVISIONS AND LEGISLATIVE INTENT OF THE STATUTES OF THE STATE OF ARKANSAS.

Paragraph "e" of Section 2025 of Pope's (1937) Digest of the Statutes of the State of Arkansas provides: "The Commission shall, at the time of granting a license certificate and as a condition precedent to the granting thereof, require a surety policy or a surety bond, satisfactory to the Commission, in some insurance company or association or other insurer authorized to transact business in this State, **in such sum as the Commission may designate,** for the protection **of all persons,** including passengers, and property resulting from the negligent operation **of such motor vehicle carrier."** (black face ours)

The statutory endorsement which must be written into such insurance policies is then set out, and that endorsement waives all policy defenses as against the public.

Section 13254 of Pope's Digest provides: "All general provisions, terms, phrases and expression used in any statute shall be liberally construed, in order that the true intent and meaning of the General Assembly may be fully carried out."

The only evidence in the record as to the **"requirements"** of the Commission as to the amount of insurance necessary to be carried by the Black and White Transfer

Company, Inc., is the letter (R. 20) of the insurance company to the Corporation Commission enclosing a binder providing $25,000 coverage for one person. In that letter it is said that the binder was being enclosed "in accordance with the requirements of your department." There is nothing in the record to show that the requirement coverage of $25,000 was reduced by the Commission.

It was certainly the intent of the Legislature of the State of Arkansas and the statute expressly provides that the insurance is "for the protection of **all persons** who may be injured or damaged as a result of 'the negligent operation **of such motor vehicle carrier'**".

Yet the Circuit Court of Appeals in its opinion held that the insurance coverage only protected the public of the State of Arkansas **as long as the assured operated strictly pursuant to a certificate of the Arkansas Corporation Commission authorizing operations as a common carrier,** clearly writing into the statute a provision that is not found therein, and which is clearly contradictory to the clear intent and purpose of the Legislature in enacting the provisions of the statute.

The Legislature, in requiring such broad coverage from common carriers, went far beyond the well settled law as declared by the Supreme Court of Arkansas of this State, yet the opinion of the Circuit Court of Appeals even conflicts with the general law applicable in the construction of all ordinary insurance contracts.

> "A contract of indemnity insurance will be construed most strongly against the insurer, and a con-

struction will not be adopted which will defeat a recovery if it is susceptible of a meaning that will permit one." Industrial Mut. Indemnity Company v. Hawkins, 127 S.W. 457, 94 Ark. 417.

"Where the language of a policy of insurance is doubtful or ambiguous, it should be given the strongest interpretation against the insurer which it will reasonably bear." Hope Spoke Co. v. Maryland Casualty Co., 143 S. W. 85, 102 Ark. 1.

Equitable Surety Co. v. Bank of Hazen 181 S.W. 279, 121 Ark. 422.

Life and Casualty Co. v. Ford, 292 S. W. 389, 172 Ark. 1098.

Metropolitan Casualty Insurance Co. of New York v. Munford, 126 S. W. 2d 282, 197 Ark. 1041.

American Fidelity & Casualty Co. v. McKee, 130 S. W. 2d 12, 198 Ark. 601.

New York Life Insurance Company v. Ashby, 138 S. W. 2d 65, 199 Ark. 881.

It was held in the last case that "provisions of all insurance contracts should be construed more strictly against insurer, and such constructions should be adopted as will not defeat recovery if it is susceptible of a meaning which will permit recovery."

If the statutory endorsement itself had not been provided for by the statutes of Arkansas, the provisions of paragraph "e" of Section 2025 of Pope's Digest, quoted at length above, would be written into the insurance contract and would be a part thereof.

E. O. Barnett Bros. v. Western Assur. Co., 220 S. W. 465, 143 Ark. 358.

American Liberty Mutual Ins. Co. v. Washington, 36 S. W. 2d 963, 183 Ark. 497.

The findings of fact No. 20 and 21 (R. 74) are entirely supported by the evidence. The findings are as follows:

(20)

"The insured, Black & White Transfer Company, Inc., was in full control of all operations of the Drivers-Owners Association and the driver of the taxicab at the time the injury was received by the plaintiff was under the direction and control of the insured, Black & White Transfer Company, Inc., and was engaged in the business of transporting persons for hire, as well as intrastate freight."

(21)

"That the taxicab which struck and injured plaintiff was at the time being operated by the insured Black & White Transfer Company, Inc., pursuant to a license certificate granted by the Arkansas Corporation Commission."

The driver of the vehicle that injured the petitioner admitted that he was on business for the assured, Black & White Transfer Company, Inc., at the time of the accident.

Q. "You were on business for the Black & White Transfer Company?

A. "Yes, sir." (R. 39)

There is not a single Arkansas case cited by the Circuit Court of Appeals. The case of Trinity Universal Ins. Co. v. Cunningham, 107 F. 2d 857, cited by the Appeal court, supports the contention of petitioner, and was quoted from (R. 81) by the District Court in his opinion.

"It is a general rule of law that an insurance policy must be interpreted to give effect to the intention of the parties so far as that intention can be discovered from the language of the policy and where the meaning of the insurance policy is fairly susceptible of two constructions, it should be construed most strongly in favor of the policyholder."

There is no question but that under the statutory law, as well as the law oftentimes declared by the Supreme Court of Arkansas, the petitioner was entitled to prevail in this case.

In the case of Erie Railroad Company, Petitioner v. Harry J. Tompkins, decided by this Court April 25th, 1938, 304 U. S. 64, it was stated by this Court in the opinion:

> "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern."

And, in the case of John G. Ruhlin et al., Petitioners, v. New York Life Insurance Company, 304 U. S. 202, it was stated in the opinion:

> "Application of the 'state law' to the present case or any other controversy controlled by Erie R. Co. v. Tompkins does not present the disputants with duties difficult or strange. The parties and the federal courts must now search for and apply the entire body of substantive law governing an identical action in the state courts."

It is respectfully submitted that this Court should issue a writ of certiorari to the United States Circuit Court of Appeals, in this action.

THOMAS B. PRYOR,
THOMAS B. PRYOR, Jr.,
Counsel for Petitioner.

G. BYRON DOBBS,
HUGH M. BLAND,
of Counsel.

25

FILED

JUN 22 19

No. [redacted] 29 4

IN THE

SUPREME COURT OF THE UNITED STATES

CLARENCE CALDWELL, Petitioner,

vs.

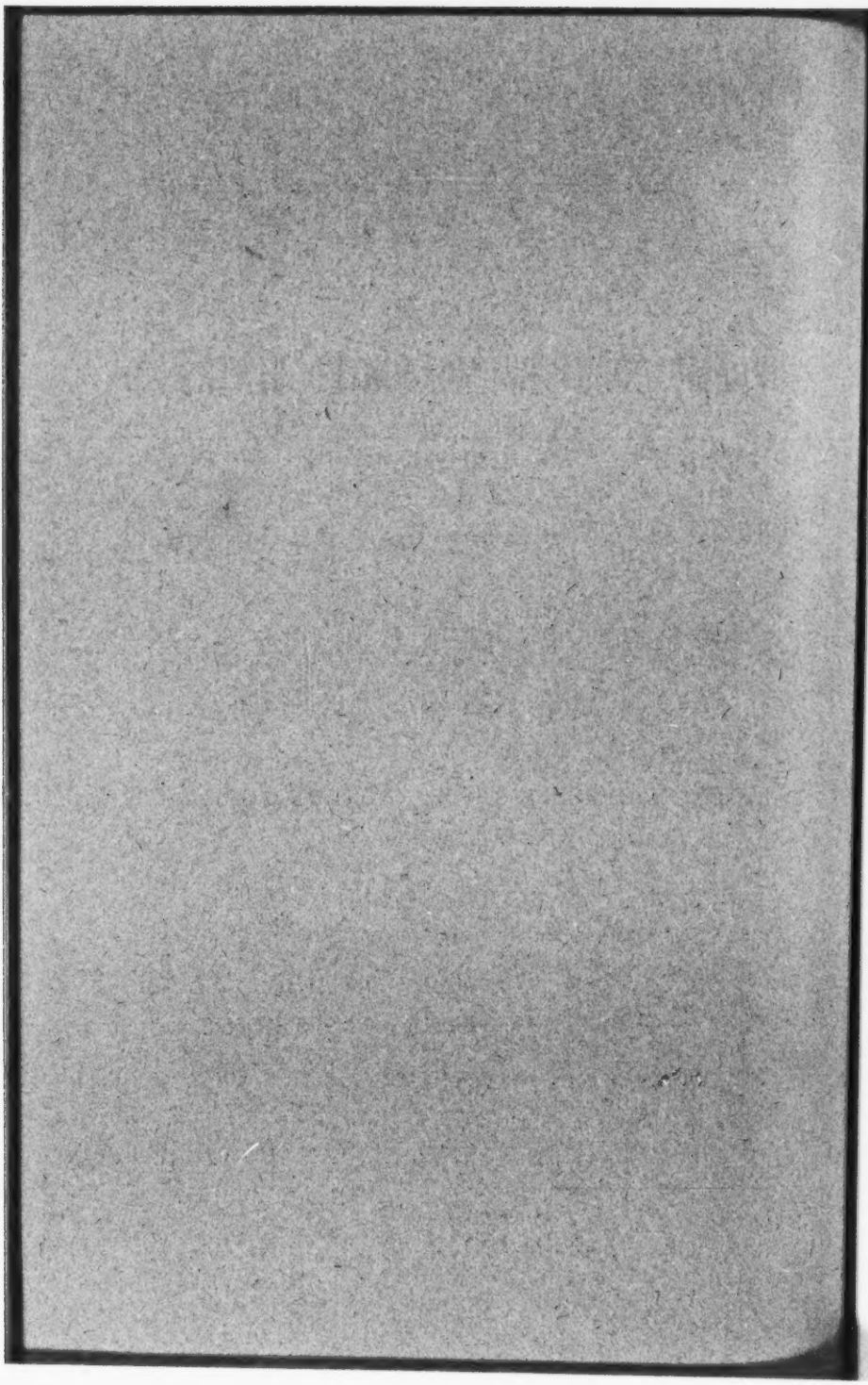
THE TRAVELERS INSURANCE COMPANY, [illegible]

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

[illegible]

[illegible]

[illegible]



INDEX

LIST OF CASES CITED

STATUTES CITED

POINTS RELIED UPON AND AUTHORITIES

In the
Supreme Court of the United States

OCTOBER TERM, 1941

CLARENCE CALDWELL ..... Petitioner

vs.

THE TRAVELERS INSURANCE COMPANY ..... Respondent

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

THIS IS NOT A CASE CALLING FOR CERTIORARI

RULE 38 established procedure for certiorari and Section 5 thereof states that the discretion to grant it will only be exercised where there are special and important reasons therefor, then indicates the character of reasons which will be considered.

This case presents none of the four classes enumerated. It presents no special or important reason for the granting thereof.

No decision of the Supreme Court of Arkansas is presented in conflict with this decision of the Circuit Court of Appeals. The only pretense thereof is seeking a "liberal" construction of the policy in favor of the insured, which is applicable where there is uncertainty or ambiguity in the contract of insurance, to which principle the Supreme Court of Arkansas has always adhered, as well as this Court and the Circuit Court of Appeals of the Eighth Circuit.

There is no ambiguity or uncertainty in the policy or the statute under which they were written which calls for "liberal" construction. The terms thereof are plainly stated in good English and no fraud or imposition or misunderstanding or mistake alleged to change the contracts as executed; and no other construction possible without rewriting the contract and the statute.

The District Court made Findings of Fact and drew inferences or conclusions therefrom that the insurance covered the injury.

The Circuit Court of Appeals on these Findings of Fact drew inferences or conclusion therefrom that the insurance did not cover it. "Granting of the writ would not be warranted merely to review the evidence or inferences drawn therefrom."

General Talk Pictures Corp. v. Western Electric Co., Inc., 304 U. S. 190.

The Circuit Court of Appeals found as a matter of fact that one of the Policies was a statutory policy and the other was not. It further held that regardless of whether the policies were statutory or not, that the vehicle that caused the injury to plaintiff was being operated at the time thereof as a taxicab or carrier of passengers for hire. It is beyond contradiction that the vehicle which struck plaintiff was a taxicab. That therefore, the exclusion clauses of the policies applied and there could be no recovery by the plaintiff.

This was strictly a question of fact and should not be reviewed by this court by certiorari.

THE PETITION DOES NOT COMPLY WITH RULES 38 AND 12

The Petition does not contain a summary and short statement of the matters involved, and does not contain "the questions presented." In a word, it does "not adequately and fairly disclose the questions involved."

Sutter v. Midland Valley RR. Co. 280 U. S. 521.

The pleadings are fairly summarized; the facts are not. The Opinion of the Court states fully the facts—all

in accordance with the Findings of Fact of the District Court (except the conclusions drawn from them by that court), and discusses the many questions presented, and the facts called for in such discussion are conspicuous by their absence in the summary statement.

Thus the first question discussed and decided (and it was sufficient to dispose of the case without the other questions) was that the insurance covered only such operations as were authorized by the Commission in its Certificate and confined the coverage to operations "pursuant to the Certificate;" and cited two earlier cases of that court and one of the Supreme Court of Kansas and of two other Circuit Courts of Appeal giving like interpretations to similar policies. The reasons therefor were as follows:

The Corporation Commission had no jurisdiction, authority or supervision over the operations of a taxicab operating under license in the City of Fort Smith; and that is what the Court meant when it stated that this insurance did not cover liability incurred by the insured in operating beyond the range of its authority under its license.

The Arkansas statute vested regulations of all public carriers in the Arkansas Corporation Commission, enumerating them, including motor vehicle carriers, but followed this grant of power with a proviso excluding from its jurisdiction any regulation or authority over street railroads or other companies operating a public utility or furnishing public service where jurisdiction thereof was elsewhere vested in a municipality. Section 2002 of Pope's Digest; see Appendix A.

Section 2016—part of the same act—vested jurisdiction in municipalities over all public utilities and companies furnishing public service therein. Appendix B. This was pursuant to public policy of the State established in 1875, vesting in municipalities control of public conveyances; employing this quaint language:

> "To regulate all carts, wagons, drays, hackney coaches, omnibuses and ferries, and every description of carriages which may be kept for hire and all de-

livery stables." Pope's Digest, sec. 9601, Appendix C.

In 1942 in *Talley v. City of Blytheville*, 204 Ark., 745 the Court quoted the above provision and applied it to municipalities licensing taxicabs—that the act was a regulatory one, not a revenue statute, and that the power to regulate includes the power to license as a means of regulating.

Therefore, the Arkansas Corporation Commission had no authority to grant a license to any public utility operating a taxicab service in the City of Fort Smith, or any other municipality in Arkansas, as it was beyond the range of its authority.

The Court adopted the statement earlier made by it (*Trinity Universal Ins. Co. v. Cunningham*, 107 Fed. (2nd) 857), that the phrase "pursuant to the Certificate," must be interpreted to exclude from the scope of the coverage vehicles not under the Commission's supervision. R. p. 99, s. c. 133 Fed. (2d) 654.

The President of these two companies—the Black and White Transfer Company and the Drivers-Owners Association—testified that the Drivers-Owners Association had a Permit from the City of Fort Smith to operate taxicabs; that the Black and White Transfer Company got a Permit from the Arkansas Corporation Commission limiting it to hauling household goods, machinery and other things mentioned and the Commission was not asked and did not grant any Permit for the Black and White Transfer Company to carry passengers (Rec. p. 42).

The Secretary testified the Black and White Cabs was a trade name under which the Drivers-Owners Association did a taxicab business in the City of Fort Smith, and it was so operating at the date of the Caldwell accident. That the business of the Drivers-Owners Association was essentially to operate taxicabs and the business of the Black and White Transfer Company was essentially to do household moving. That the Black and White Transfer Company applied to the Arkansas Corporation Commission to do business as a baggage company limited to hauling household goods, machinery and commodities. It

had no authority under its Permit to carry passengers. Record pages 43-45.

None of these facts or statements appear in the summary statement and the Findings of Fact of the District Court on them are ignored.

Finding (16), Record page 72, gives the details of Monty Robinson driving a cab, picking up a regular passenger at her house and receiving another passenger, the call for whom he had received from the Black and White Transfer Company. In carrying these two and another passenger to their various destinations in the city of Fort Smith and while in such operation the injury to Caldwell was caused by the operation of the cab so driven by Monty Robinson.

In Finding (17), Record page 73, the Court found that at the time of the injury to the plaintiff the Drivers-Owners Association was operating a public taxicab service in Fort Smith under the trade name of Black and White Cab Company, and gives the details of their operations, having some common employees and the same officers and stockholders.

Then from the various Findings the Court made Finding (21) to the effect that the taxicab which struck and injured plaintiff was at the time being operated by the insured, Black & White Transfer Company, Inc., pursuant to a license certificate granted by the Arkansas Corporation Commission.

This is a non sequitur. It is an inference or conclusion drawn by the court from the established facts. It is erroneous in that the Arkansas Corporation Commission had not issued any license to the Black & White Transfer Company, Inc., to engage in the business of transporting persons for hire in the city of Fort Smith and had no jurisdiction to do so.

Likewise the (22) Finding is a non sequitur.

Therefore, it is apparent that the Petitioner has not stated the issues involved.

ANSWERING THE ARGUMENT

The Petition, page 17, quotes the first subdivision of Paragraph "e" of Section 2025 of Pope's Digest. This section imposes duties on the Commission; others prescribes terms of the policies to be taken; "All insurance policies shall contain the following endorsement:"

The first subdivision of this Endorsement requires it to be construed under the Act of 1927, and amendments thereto; and with the rules and regulations of the Corporation Commission. Then follows this requirement:

> "In consideration of the premium stated in the policy to which this endorsement is attached, the Company hereby waives a description of the motor vehicles to be insured hereunder, and agrees to pay any fine or judgment for personal injury, including death, resulting therefrom and/or damage to property, other than insurance, caused by any and all motor vehicles operated by the assured, pursuant to a certificate issued by the Corporation Commission of the State of Arkansas within the limit set forth in the schedule shown hereon."

The balance of the endorsement is not pertinent. It is copied in Petitioner's Brief, page 8.

Therefore the generality of the first subdivision of Paragraph "e" is made into a specific form of contract between the insurer he insured, and the public in an amount fixed by th ommission, and the contract to be filed with the Commission for the benefit of the public. Therefore, it is plain that there is no coverage here for injury to persons or property resulting from negligent operation of the insured motor vehicles, unless they were in operation in pursuance to the Certificate issued by the Commission.

The Arkansas Corporation Commission issued no Certificate to the Black and White Transfer Company to operate taxicabs in the city of Fort Smith; it had no right to do so and did not do so.

It issued a certificate as a freight carrier of designated commodities in a specific area, including the City of Fort Smith. The District Court found it operated a taxi-

cab business in Fort Smith, and while doing so the injury sued for was caused by a conveyance engaged in transportation for hire (Rec. Pages 72-74). The exclusion of such vehicles from the coverage and the limitation of the coverage to the business authorized by the Commission each rendered impossible liability upon these insurance contracts.

At page 18 the Petition states that the Circuit Court of Appeals held that the insurance coverage only protected the public so long as the insured operated strictly pursuant to the certificate of the Arkansas Corporation Commission authorizing operation as a common carrier, and it is added that this was clearly writing into the statute a provision that was not found therein.

Certainly the provision is found therein as hereinbefore just quoted. There is no requirement of *strict* operation pursuant to the Certificate, but merely operations pursuant thereto. Operating a taxicab when the Company was only authorized to operate freight vehicles cannot be construed in any way other than operations outside of the Certificate. It was the Legislature that put this Limitation into the policies required to cover the operation which the Commission authorized the applicant to perform; the Commission's duty was to protect such operation and no other.

At page 20 it is stated that the driver of the vehicle that injured the Petitioner admitted he was on business for the insured, Black and White Transfer Company at the time of the accident, and quote an isolated statement from his testimony to that effect.

Turning to the testimony of this witness at Record pages 37 to 39 it is found that he got a call from the Transfer Company to pick up a passenger when he called for one of his regular passengers across the street from where his passenger resided. He stated he frequently handled calls like this, and when he received them the Transfer Company paid him therefor and he did not collect anything from the passenger, but got it from the Transfer Company. This was what he meant when he said he was on business for the Transfer Company—which in a sense was true—but does not change the fact that

the vehicle that caused the injury to Caldwell was a taxicab operating under license from the City and the Transfer Company had no Certificate from the Corporation Commission for such operation and taxicabs were excluded from the policies.

The question of the validity of the exclusion clause in both policies, should an injury be caused by a vehicle carrying passengers for hire, is so well stated in the opinion that we will not add anything thereto.

The Brief at page 18 states that the only evidence as to the "requirements" of the Commission as to the amount of insurance was in the Binder which called for $25,000 and stated there was nothing in the record to show the requirement coverage of $25,000 was reduced by the Commission. The facts are to the contrary.

At page 7 the brief quotes from the Binder that it should terminate by issuing to the assured a duly executed policy, or policies. Then follows at page 7 a statement that the Commission received a letter dated April 28, 1938, purporting to enclose Policies No. FA-1109020 and FA-1109209, supplanting the Binder which had theretofore been filed, and then it is stated the policies are found as Exhibits 3 and 4. This is an incorrect statement of the facts. The letter referred to is found at page 23 of the record. It carries the caption of Black and White Transfer Company, Inc., and the number of both Policies—FA-1109020 and FA-1109209. The body of it states that the writer was attaching a "filing policy" and asks that the Commission acknowledge receipt of the filing of this "filing policy."

There was only one policy filed. The law required the statutory policy to be filed. The Corporation Commission certified that the only policy filed was FA-1109020, which is the Statutory Policy for $5000.

This was filed April 29th, and it was the only policy filed to cover operations of the Black and White Transfer Company, and covered the operations for the period from April 5, 1938 to April 5, 1939. Rec. pages 52-53.

The District Court's Finding of Fact (12) confirmed this Certificate of the Corporation Commission (Record page 71).

The other non-statutory policy was $25,000—including the $5000 statutory one, and these two policies satisfied the requirement of the Binder as to the amount of insurance and satisfied the Commission of the amount of it to be statutory insurance, which was evidenced by the filing copy accepted by the Commission as covering the operations for the year in question.

It is worthy of note that the writer of this Opinion had been a practicing lawyer in Arkansas for 33 years before he was appointed to the Circuit Court of Appeals. See Martindale-Hubbell Law Directory, 1943, page 38.

JOSEPH M. HILL,

HENRY L. FITZHUGH,

Attorneys for Respondent.

APPENDIX

A Excerpts from Pope's Digest, "Section 2002, Jurisdiction:

The jurisdiction of the Commission shall extend to and include all matters pertaining to the regulation and operation of—

(a) All Common Carriers * * * (enumeration omitted). Provided, however, that nothing herein shall vest said Commission with jurisdiction as to any rate, charge, rule, regulation, order, hearing, investigation, or other matter pertaining to the operation within the limits of any municipality of any street railroad, telephone company, gas company, pipe line company for transportation of oil, gas or water, electrical company, water company, hydroelectric company or other company operating a public utility or furnishing public service as to which jurisdiction may be elsewhere conferred in this act upon any municipal council or city commission; notwithstanding, however, the jurisdiction of the municipality as to the above matters within the limits of such municipality."

* * * * *

B Excerpts from Pope's Digest, Section 2016:

"Jurisdiction of cities. The jurisdiction of the municipal council or city commission of any municipality shall extend to and include all matters pertaining to the regulation and operation within the limits of any such municipality of any street railroad, telephone company, gas company furnishing gas for domestic or industrial purposes, pipe line company for transportation, distribution or sale of oil, gas or water, electrical company, water company, hydro-electric company or other company, operating a public utility or furnishing public service within such municipality."

* * * * *

C Excerpts from Pope's Digest, Section 9601:

"They (municipal corporations) shall have power * * to regulate all carts, wagons, drays, hackney coaches, omnibuses and ferries, and every description of carriages which may be kept for hire and all delivery stables."